



Miltons Matsemela Inc

The Conveyancers

NEWSLETTER

July 2014

IMMIGRANTS, VISITORS AND PARENTS: NEW TRAVELLING RULES, NEW RISKS

Extensive media coverage of the new Immigration Regulations suggests that they are very likely to be challenged in the courts as unworkable and unconstitutional, but bear in mind that in the interim they remain in force and you are going to have problems if you don't comply with them.

The risks of non-compliance

The Regulations are complex and full of grey areas, and might even be changed at short notice, so if you are in South Africa or intend to enter the country on a "visa" or "permit" (most "permits" under the old rules are now called "visas") take advice on your position now. **Note in particular (a) the danger of being declared "undesirable" and prohibited from re-entering South Africa (note 2 below) and (b) the new rules relating to children (note 8 below).**

Critical changes

Some of the critical changes to be aware of –

1. If you need to apply for a visa extension you must do so 60 days prior to expiry (up from 30 days previously).
2. If your visa has expired, the old system of just paying a fine when leaving the country has fallen away. Instead you risk being declared "undesirable" and prohibited from re-entering South Africa for –
 - a. 1 year if you overstay for 30 days or less,
 - b. 2 years if you overstay for a second time within 24 months,
 - c. 5 years if you overstay for more than 30 days.

If it happens to you, follow the appeal procedure immediately.

3. You must apply for entry, transit or temporary residence visas in your own country.
4. Similarly, if you need to change your visa status (e.g. from a visitor's visa or medical treatment visa to a temporary residence visa), you are – except in exceptional circumstances - going to have to leave the country and apply in your own country.
5. The rules applying to work, business, intra-company transfer work visas and corporate visas have changed, whilst "quota work" and "exceptional skills" visas are now replaced by a "critical skills" visa.
6. Applicants for spousal visas or permanent residence permits will need to prove that they have been in their relationship for at least two years.
7. Applicants for Life Partner visas or permanent residence permits will need to –
 - a. Provide proof including a notarial agreement, prescribed-form affidavit and financial support documentation that they have been in the relationship for at least two years "to the exclusion of any other person", and
 - b. Attend separate interviews to confirm the authenticity of the claimed relationship.

8. Children: New rules apply to travelling with children and to unaccompanied minors – from 1 October children must have both a passport and an unabridged birth certificate even when travelling with both parents. Further documentation and authorisation are needed where only one parent or a non-parental guardian are travelling with the child or if the child is unaccompanied – get full advice on your particular circumstances. If you don't already have all the necessary documents apply for them now – 3 months may seem like a long time but Home Affairs is going to be swamped.

Home Affairs has indicated that "Visa Facilitation Centres" will have opened in all provinces by the end of June. These centres will receive and manage visa and permit applications (except those which you are required to apply for in your own country – see above) but will it seems not give immigration advice. The visa and permit applications themselves will still be assessed by the Department of Home Affairs'

Head Office in Pretoria. Non-South Africans with legal residency permits in South Africa can apply for a visa or permit at these Centres. Zimbabwe nationals on Special Dispensation for Zimbabweans Project, Asylum and Refugee cases are directly handled by the Department of Home Affairs.

LANDLORDS: MANAGING YOUR TENANT'S LIQUIDATION

In these hard times, you may well be faced with a situation where your tenant is liquidated ("sequestered" in the case of an individual or trust, "liquidated" or "wound up" in the case of a company). If that happens, what are your rights and how do you manage them?

A recent Supreme Court of Appeal decision illustrates the principles involved.

The landlord, the lease and the sub-lease

- A tenant had installed a sub-tenant in a portion of leased business premises,
- Stressed financially, the tenant breached its lease by failing to pay its rental on time,
- On 16 January the landlord gave notice to the tenant to remedy the breach within 7 days or face cancellation of the lease,
- Although the tenant was finally liquidated only on 27 February, the effective date of a company's liquidation is always retroactively backdated to a "deemed" date of liquidation. That "deemed" date is the date the application for liquidation is lodged with the Court, and in this case it was 21 January – therefore the landlord's 7 day notice period had not expired at the effective date of liquidation,
- On 27 January (i.e. 6 days after effective date of liquidation), the landlord delivered to the tenant a letter cancelling the agreement,
- The liquidator of the tenant then tried to enforce the lease against the sub-tenant, arguing that the lease remained in force because the purported cancellation was only made after date of liquidation and was therefore invalid.

The liquidator and the law

- At date of liquidation the "hand of the law" is laid upon the estate of the insolvent or company and the rights of all parties are "frozen",
- In regard to leases, the liquidator of a liquidated tenant has the right to make an election – either continue with the lease or cancel it and leave the landlord with a concurrent claim for damages,
- Should the liquidator elect to continue with the lease, he/she "steps into the shoes" of the tenant, and has no greater rights in terms of the lease than the tenant had,
- The result - all rental for the post-liquidation period is payable by the liquidator to the landlord as a cost of liquidation, and – crucially in this case – "the terms of the lease remain in place and the liquidator must comply with it". The liquidator is "obliged to perform whatever is required of the insolvent in terms of the contract, including unfulfilled past obligations of the insolvent",
- Thus, held the Court, "The issue is simply whether there was an effective and enforceable right at the critical time – the time of the cancellation". In this case, the landlord had a clear, enforceable right to cancel the lease when it did, and the cancellation was accordingly valid against the liquidator.

Landlords: Taking timeous action to protect your rights in the event of any default by your tenant is critical. Note that any provision in your lease for it to be terminated automatically on liquidation is void. Take advice - at the first sign of financial stress in your tenant - on how to best protect your rights.

Sub-tenants: Your rights are subject to those of the main tenant, so if the landlord cancels the main lease, your sub-lease ends as well. Again, take advice on protecting your rights if the tenant shows any signs of financial stress.

THE SHOPPER WHO SLIPPED: DUTIES AND DAMAGES

You go shopping and as you walk down a supermarket aisle you slip on a wet and slippery patch of floor, injuring yourself. Do you have a claim against the store for your damages?

You do indeed, but only if you can show that the store and its employees were negligent. In a case recently decided by the Supreme Court of Appeal, a shopper sued a store for her injuries after she slipped on a section of floor left damp by a cleaner who had mopped the floor in a routine cleaning operation during a busy period in the store. Importantly, although there was a pertinent warning sign, it was beyond the point where she fell.

Our courts have confirmed in many cases that the owner of a store has a legal duty to ensure that its premises are safe for those who use them. It must therefore take steps to minimise or eliminate the risk of harm posed by any potential hazard. And in the circumstances of this particular case, held the Court, the cleaner had been negligent in not ensuring, after mopping the floor, that it was dry and safe.

Shoppers – your damages claim

If you are injured in a store and think the store is at fault, take advice straight away on claiming for your damages.

Store owners – a checklist

- If you employ an independent cleaning contractor, do so under a written contract (*checked by your attorney before signature*) so you can prove it. In this case the store tried to transfer all the liability onto a cleaning company but failed to produce proof of an

“independent contractor” relationship.

- Check that your insurance cover against this sort of claim is adequate.
- Enforce in-store procedures to deal not only with accidental spillages but also with “voluntary” tasks like the “routine cleaning” that caused the accident in this case.

ESTATE AGENTS – 1 YEAR TO GO!

30 June 2015 – that’s your deadline to be certificated against either the Real Estate NQF Level 4 (for non-principal estate agents) or the NQF Level 5 (for principal estate agents).

Heed this warning from the Estate Agency Affairs Board:

“It is not envisaged that this time period will again be extended. It is to be underscored, therefore, that those affected estate agents who have still not been certificated by the extended date will not be issued with fidelity fund certificates, entitling them legally to perform the functions and activities of an estate agent, for the 2016 calendar year.”

Milton Koumbatis
Director

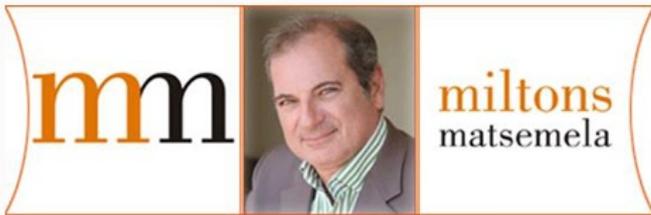


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